

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BOBBIE TORRY,

Petitioner,

ORDER

v.

09-cv-656-slc

GREG GRAMS,

Respondent.

Bobbie Torry is a state prisoner at Fox Lake Correctional Institution serving a term of imprisonment pursuant to his January 2002 conviction for attempted first degree homicide, false imprisonment and substantial battery. In 2009, he filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, but this court dismissed it after petitioner failed to submit either the \$5 filing fee or a completed application for leave to proceed *in forma pauperis*. Dkt. #3. In August of this year, he filed a motion to reopen his petition and add new claims. Dkts. ## 4 & 5. On September 24, 2018, this court dismissed his motion to reopen his case, on the ground that it was a second or successive petition for which petitioner had failed to obtain the authorization required under 28 U.S.C. § 2244(b)(3)(A). Dkt. #6.

As it turns out, that ruling was in error: a petition that is dismissed for failure to pay the filing fee does not “count” as the first petition, so petitioner’s latest attempt to file a habeas petition attacking his 2002 conviction is treated as his first. Pavlovsky v. VanNatta, 431 F.3d 1063, 1064 (7th Cir. 2005). Thus, when petitioner asked the Court

of Appeals for the Seventh Circuit to authorize his successive petition, the court told him such authorization was unnecessary. Instead, it construed his application as a notice of appeal from this court’s September 24, 2018 order. Dkt. #7.

Petitioner has now filed a motion in this court to dismiss his appeal and permit him to file a new habeas corpus petition within 90 days. Dkt. #13. Because the filing of a notice of appeal ends this court’s jurisdiction, this court lacks the authority to dismiss the appeal. Petitioner must direct his request for dismissal to the court of appeals. If that court dismisses the appeal, then this court will vacate its September 24, 2018 order and docket petitioner’s “Rule 60(b) motion” as a new petition for a writ of habeas corpus challenging his 2002 conviction.

Entered this 15th day of November, 2018.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge